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ALEXANDER L. STEVAS

No. 80-990

IN THE

Supreme Court of the United States

October Term, 1980

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASENSTAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICHARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

Reply Brief for Clarence E. Cabell, et al., Appellants.

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Reply Brief for
Clarence E. Cabell, et al., Appellants.

INTRODUCTION.

In this reply brief, the Appellants respond to the following contentions and issues raised in the briefs of the Appellees and their amici.

1. Whether requiring Probation Officers to be citizens is unconstitutional.

2. Whether the challenged statutory scheme is unconstitutionally overbroad.

3. Whether the District Court Judgment should be vacated and remanded for the taking of further evidence on the duties of Probation Officers.

Regrettably, the Appellees in an attempt to paint California with the broad brush of institutional bigotry, at the outset of their brief lapse into the unfortunate and irrelevant practice of engaging in an ad hominem form of argument by referring to far earlier, and admittedly lamentable, cases involving restrictions against aliens. In truth, today there are extremely few restrictions on the employment or other rights of aliens in this country. None exist in private sector employment and it is only in certain narrow areas of governmental employment as recognized by this Court in *Sugarman, Foley* and *Ambach* that citizenship restrictions are applied.

The initial issue in this case is whether within the criteria of those cases a citizenship requirement for a probation officer is constitutionally permissible. If such a requirement is valid, the inquiry then turns to whether the statutory scheme implementing the requirement is unconstitutionally overbroad.

Also, largely irrelevant, is the technical competence of a particular individual to perform the job. It is recognized that a citizenship requirement in very large measure is directed toward the affirmation of allegiance to the country the individual seeks to serve as a condition for participating in the performance of important governmental functions.[1] The ability to speak Spanish may be an extremely desirable qualification for a probation officer in California, but there are literally millions of Spanish-speaking citizens that can also perform that task.

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[1] "The distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State. . . . The form of this association is important: An oath of allegiance or similar ceremony cannot substitute for the unequivocal legal bond citizenship represents." *Ambach v. Norwich*, (1979) 99 S.Ct. 1589 at 1594.

ARGUMENT.

I.

SECTION 1031(a) AS APPLIED TO THE CLASS OF PROBATION OFFICERS IS CONSTITUTIONAL AS THESE GOVERNMENTAL EMPLOYEES FALL WITHIN THE *SUGARMAN* EXCEPTION.

A. The Strict Scrutiny Standard Is Not Applicable.

The Court in *Sugarman v. Dougall*, 413 U.S. 634, 617 (1973), in broad terms stated that citizenship may be reserved for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government. It is clear from the subsequent decisions of the Court in *Foley* and *Ambach* that this language was not construed as restricting citizenship to the highest executive levels of government. The arguments made by the Appellees as to why probation officers as a class do not perform duties within the ambit of *Sugarman* echo those rejected by the Court in *Foley* and *Ambach*.

It is clear that *Sugarman* and the subsequent *Foley* and *Ambach* decisions establish the doctrine that there are limitations to the application of the strict scrutiny doctrine when the government seeks to impose citizenship requirements on its public employees. It is true that aliens are recognized to be a protected minority or insular group to which restrictions must be viewed in general under the strict scrutiny doctrine. However, the mere fact of alienage does not do away with all attributes of citizenship. The Appellants urge that when measured by the full scope of the probation officer's function and role in government, in the criminal justice system, and in society, the *Sugarman* criteria as applied by this Court in *Foley* and *Ambach* to police officers and teachers clearly sustain a citizenship requirement for probation officers.

The Appellees advance a theory that in determining whether a particular governmental job is part of the "political community" for citizenship purposes, the Court should first apply the strict scrutiny standard. Only if the job classification in question passes that hurdle they contend, will the rational basis standard be applied to the issue of whether the citizenship requirement is related to the duties of the position. Although the Appellants believe in light of the *Foley* and *Ambach* decisions that a citizenship requirement for probation officer would clearly meet constitutional muster even under such a strict scrutiny test, the suggestion of the Appellees is contrary to the standards articulated by this Court and are an invitation to reverse the essential holdings in *Foley* and *Ambach* with regard to citizenship and governmental employment. It is nothing more than an argument to apply the strict scrutiny standard even to public employment.

It appears clear from this Court's decisions in *Foley* and *Ambach* that it did not impose a strict scrutiny standard in the initial determination of whether the occupation in question was part of the "political community". Prior to that in *Sugarman v. Dougall*, 413 U.S. 634 (1973), the Court observed that it would be inappropriate to require every statutory exclusion of aliens to meet the strict scrutiny test. "Our scrutiny will not be so demanding where we deal with matters firmly within a state's constitutional prerogatives." *Sugarman v. Dougall. Id.*, at 648. Moreover, "[W]e recognize too, the State's broad power to define its political community". *Id.*, at 643. Then in *Foley* the Court held that "The state need only justify its classification by showing of some rational relationship between the interest sought to be protected and the limiting classification." *Foley v. Connelie*, (1978) 435 U.S. 291 at 296.

This Court in recent years, in citizenship cases, has recognized a distinction between private and public employment. Perhaps it is because government employment by its

very nature performs services on behalf of the public at large and that a great number of employment activities significantly impact upon the rights of citizens, that the courts have recognized this distinction. Moreover, the application to a narrow segment of government employment does not strike at the noncitizen's ability to exist in the community. From *Sugarman* through *Foley* to *Ambach*, this Court has clearly stated that a standard less than strict scrutiny is applicable to the government's imposition of a citizenship requirement on their employees.

"It would be inappropriate, however, to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny', because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship' . . ." *Foley v. Connelie, supra* at 295.

The less stringent standard was again restated in *Ambach v. Norwich*, 99 S.Ct. 1589 (1979).

"The exclusion of aliens from such governmental positions would not invite as demanding scrutiny from this Court." *Ambach v. Norwich, supra*, at 1593.

"The distinction between citizens and aliens though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Id.* at 1593-94.

While the determination of whether a particular governmental job is of such a nature to be within the political community is not one susceptible of clear-cut distinctions and well defined parameters, it appears clear that by applying the standards of review followed in *Foley* and *Ambach* and by measuring the duties of the probation officer against the duties of police officers and teachers that the Appellants herein have shown that a citizenship requirement may be validly applied to the position of deputy probation officer. No standard of review should be applicable to this case different than that followed in *Sugarman, Foley* and *Ambach*.

B. The Duties and Responsibilities of Probation Officers, Consistent With the *Foley* and *Ambach* Criteria, Fall Within the *Sugarman* Definition of Political Community.

The Appellees' attempted distinction, utilizing such terms as "ministerial" and "functionary", of the duties of a probation officer and those of police officers and teachers is not persuasive. Their points, conclusionary and lacking substance, ignore the essential core role, vastly discretionary, played by probation officers in the nation's criminal justice system. Recognizing that a police officer may be required to be a citizen, the Appellees have failed to advance a single viable reason why the probation officer's role is so different and less significant than that of the other citizen participants in the criminal justice system, i.e., prosecutor, police, judge, and juror, that citizenship constitutionally cannot be required.

The statutory responsibilities imposed upon probation officers exceed by far those of police officers and school teachers. A probation officer's job is so uniquely governmental that it finds no counterpart in the private sector and cannot by any stretch of the imagination be considered one of the common occupations of the community.

This Court and the Circuit Courts on numerous occasions have emphasized the probation officer's role as an arm of the court, in representing the interests of society by exercising discretionary power directly impacting on an individual's rights and liberties, and their authority to act in a quasi-judicial capacity. Indeed, the failure of a probation officer to properly carry out his duties has been held to deny a probationer his due process.[2]

The Ninth Circuit in *Burkes v. Callion*, 433 F.2d 318 (1970), a civil rights action brought under 42 USC § 1983(2)

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[2]*United States v. Tyler*, 605 F.2d 851 (1979).

against a Los Angeles County Deputy Probation Officer for allegedly making false statements of fact in his probation report, ruled (at page 319) that "a probation officer preparing and submitting a probation report in a criminal case is performing a quasi-judicial function and is entitled to a similar, if not the same, immunity that is accorded to judges for acts done by them in the exercise of their judicial functions." The immunity granted probation officers in performing their functions and exercising their discretion makes their role even more fundamental and critical in the relationship between the government and its citizenry.

In *United States of America v. Tyler*, 605 F.2d 851, at 853 (1979), the Fifth Circuit, noting the discretionary authority of a probation officer, overturned the probation officer's revocation of parole for failure to exercise reasonable diligence stating "nor do we suggest that a revocation proceeding should be initiated as a reflexive reaction to any technical or minor violation of the terms of probation. The probationary system, however, imposes a duty on a probation officer to represent the interests of both society and probationer." The Sixth Circuit in *Greene v. Michigan Department of Corrections*, 315 F.2d 546 (1963), has held that the failure of a probation officer to exercise reasonable diligence to revoke parole when there has been a violation committed may result in a waiver of the violation and loss of jurisdiction.

The authority of probation officers, beyond even that of police officers, to interfere with the fundamental liberties of other citizens was observed by the Ninth Circuit in *United States of America v. Consuelo-Gonzalez*, 521 F.2d 259 (1975). In this case the court held invalid a search of a person's home conducted by police pursuant to a federal probation condition that the defendant submit to a search of her person or home at any time when requested by law enforcement officers. In so ruling, however, the court specifically distinguished between searches by police officers

and those by probation officers. If the search had been made by a probation officer the court concluded it would have been legal.

The extensive authority of probation officers to interfere with the liberties of citizens was underscored by the Circuit Court when it ruled that a probation officer need not have probable cause nor obtain a warrant prior to the search of a probationer. The majority noted

> "*Probation authorities also have a special and unique interest in invading the privacy of probationers. This special and unique interest is not extended to law enforcement officers generally*. To interpret the Federal Probation Act in such an expansive manner would not be reasonably related to the Act's purposes. For this reason we interpret the act to require that searches of probationers not otherwise in compliance with the usual standards of the Fourth Amendment be by or under the immediate and personal supervision of, probation officers." . . . (Emphasis added)
>
> "Moreover, a thorough search of a probationer's residence incident to, or following, a probation visit is not dependent upon the establishment of probable cause. A reasonable belief on the part of the probation officer that such a search is necessary to perform properly his duties is sufficient. As we said *Latta vs. Fitzharris*, this belief may be based on a 'hunch' having its origin in what the probation officer has learned or observed about the behavior and attitude of the probationer." *United States v. Consuelo-Gonzalez*, 521 F.2d 259 at 266.

This broad grant of authority beyond that afforded ordinary police officers, coupled with the probation officer's immunity when acting in a *quasi judicial* capacity, manifestly establishes the probation officer's fundamental role in the execution of broad public policy sufficient to comply with the *Sugarman* criteria.

The Appellees' contentions that the duties of a probation officer are narrow in focus and impact only upon a small group of individuals is misplaced. The probation officer's function is directed toward the larger constituency of the general community and society.

> "There can be little doubt that probation constitutes a form of 'corrective and preventive guidance designed to protect the public by correcting the anti-social tendencies' of offenders and thus is treatment as defined in 18 U.S.C. §5006(g). The basic purpose of probation is to 'provide an individual program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for this original offense in the event he abuses this opportunity.'" *United States v. Glasgow*, 389 F.Supp. 217, at 222 (1975)

The court in *Glasgow* quoted with approval the observations of the American Bar Association in its recently adopted standards on probation. "Probation is an affirmative correction tool, a tool which is used not only because it is of maximum benefit to the defendant (though, of course, this is an important side product), but because it is of maximum benefit to the society which is sought to be served by the sentencing of criminals." *United States v. Glasgow*, *supra* at 222. The ABA Standards Relating to the Administration of Criminal Justice, Compilation (1974), p. 386, Note 11, states, "The deterrent and rehabilitative effects of probation are deemed by the ABA to be so substantial, when probation is administered under a system which is adequately funded and sufficiently manned by skilled personnel, as to render probation the preferred disposition in all criminal cases, to be imposed 'unless particular aggravating facts emerge in the case at hand.' "

This Court in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973) noted the discretion and skill necessarily exercised by probation officers in the parole revocation process — a process, of course, which directly affects the liberty of the probationer. The probation officer must first determine if the parolee has violated a condition of parole and secondly, if he did, should he be recommitted to prison or should other rehabilitative steps be taken. The Court observed that a parole violation does not necessarily or automatically result in a revocation of parole. The result to a very great extent depends upon the judgmental evaluation of the probation officer.[3]

The Appellees have failed to address the important, if not predominate, role that probation officers play in the juvenile justice system. In California, as the multiple statutory provisions demonstrate (see citations in Appellant's opening brief, pages 50-19), the role of the probation officer is extensive and pervasive. Most significantly, the probation officer plays a vital role in the initial determination of whether the juvenile is diverted from the criminal justice

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[3]The Court in footnote 8 at 411 U.S. 784, observed the criticality in the parole revocation process of the professional evaluation by the probation officer.

> "The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment of financial obligations, the extent of his cooperation with the probation or parole officer assigned to his case, his personal associations, and — of course — whether there have been specific and significant violations of the conditions of the probation or parole. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, The Revocation Decision: A Study of Probation and Parole Agents' Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin 1964), cited in Brief for Petitioner, Addendum 106."

system. How the probation officer relates with the juvenile offender is critical, even more so than with adults, because juveniles are in their formative years. In summary, if probation officers did nothing but perform their statutory duties with regard to juveniles that in itself is sufficient to make them a part of the political community within the ambit of the *Sugarman* exception.

The fact that the probation officer does not come in contact with vast numbers of the public in conducting his daily activities does not militate against their being members of the political community. As the courts and the American Bar Association have observed, the role of the probation officer extends beyond his immediate contact with the probationer to directly relate to the welfare of society. Personal contacts with the probationer is only one facet of the probation officer's multiple responsibilities. It also encompasses investigations and reports, and making evaluations and recommendations to the Court — recommendations which are pivotal as to the disposition of the offender. The great increase of crime in recent years[4] makes probation and probation officers an even more important element in the criminal justice system. The fact there are increased caseloads and less funds for hiring more probation officers does not detract from their fundamental role or the importance of their activities.

II.

CALIFORNIA'S STATUTORY METHOD OF IMPOSING CITIZENSHIP REQUIREMENTS ON PEACE OFFICERS IS NOT UNCONSTITUTIONALLY OVERBROAD.

A. Peace Officers With Powers of Arrest Are Properly Included Within the States' Political Community.

Although California's statutory citizenship requirements do not neatly fall into either the *Sugarman* or *Foley* factual context, the statutory provision is sufficiently definitive and

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[4]Amicus SEIU (Brief, page 3, note 4) notes that the number of felony arrests increased from 170,980 in 1979 to 189,303 one year later. Those receiving either probation or probation with jail correspondingly swelled from 22,425 to 24,767.

narrow to withstand constitutional challenge. Unlike the challenged statute in *Sugarman* which applied a citizenship requirement to all civil servants, California's statutory approach pertains only to those designated as possessing peace officer status, a very narrow but significant public position of trust and authority.

Although the categories enumerated approximate 70, most perform the same peace officer functions but for different jurisdictions or entities within the state. Thus, the statutes are subdivided into deputy sheriffs, city police, members of the highway patrol, state employees whose primary duty is law enforcement (Govt. Code § 830.3), members of a state or local agency whose primary duty is law enforcement (Govt. Code § 830.31) and probation officers. The number of public occupations limited to citizens under the peace officer category is extremely narrow compared with the thousands affected in the *Sugarman* case.

As this Court has observed, the state has the broad power to define those governmental occupations which form a part of their political community. California has done so with regard to peace officers and a review of those duties of those peace officers in light of *Foley* supports the citizenship requirement imposed. All the incumbants of the peace officer categories affected by Section 1031(a) have the authority to make an arrest upon probable cause and may carry weapons in the performance of their duty if authorized by their employing agency. For example, Government Code Section 830.31 describes as peace officers various persons who, as members of a state or local agency, have a primary duty of law enforcement. Included in that category are park rangers.[5] These persons, including the park rangers, are provided under California law with authority extending to

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[5]California Government Code Section 830.31(b). This section provides that it is only applicable to park rangers that have a primary duty of property protection and the keeping of the peace.

any place in the state for the purpose of performing their primary duty or when making an arrest pursuant to Section 836 as to any public offense with respect to which there is an immediate danger to person or property.

California Government Code Section 832 provides that every person designated a peace officer shall receive a course of training in the exercise of his powers of arrest and in the carrying and use of firearms. The courses must meet minimum standards prescribed by the Commission on Peace Officers Standards and Training (POST). If the persons do not satisfactorily complete the course, they are stripped of the powers of a peace officer until such is accomplished (Government Code Section 832(c)).

The individuals enumerated in California's Peace status subject to a citizenship qualification have a primary duty of law enforcement in their particular jurisdiction with the concomitant power of arrest. Thus, they clearly exercise one of the most important sovereign powers of the state—the power to restrain the liberty of its citizens. To the public they represent and symbolize the state's authority and power to execute its policy, be it with regard to motor vehicle operation or the maintenance of peace in its parks. In light of the state's broad authority to define the members of its political community, the designation of peace officer in the categories in question, cloaked with the power to make arrests and with other attributes of law enforcement, is not unconstitutionally restricted to citizens.

There are extremely few classifications of peace officer within California's statutory scheme that might be suspect with regard to citizenship. The District Court below only considered evidence on the particular duties of probation officers and therefore had no basis to assume that many of the enumerated categories did not form a part of the political community. In view of the lower court's conclusion that a probation officer was not part of the political community, the court never had reason to consider, on a position by

position basis in accordance with the guidance of this Court, the other categories enumerated in the statutory scheme.

As a practical matter, the appellants urge there is no difference for constitutional purposes between the California statutory scheme of referencing peace officer citizenship requirements to one statute, and that of providing in each statutory category of peace officer a proviso that citizenship was required. The overbreadth argument could not be raised if all the subdivisions of Government Code Section 830, *et seq.*, pertaining to peace officer positions each specified a citizenship qualification.

The fact that within the peace officer category, the duties may vary among positions, does not make the basic statutory approach unconstitutional. The situation is not unlike that involving public school teachers in *Ambach*. The argument was made in that case that the statute requiring all public school teachers to be citizens was unconstitutionally overbroad because it encompassed all teachers regardless of the subject taught, be it history, civics, or machine shop. The Court found this argument unpersuasive. Because the arguable California peace officer classifications are so few in number and require further specific fact findings in accordance with this Court's direction to examine each challenged position on a case by case basis, the instant case is an inappropriate one for declaring §1031 unconstitutionally overbroad. The decision should be restricted to the occupation sought by appellees — deputy probation officers — and the evidence overwhelmingly sustains a citizenship requirement for this significant public official.

B. There Are Compelling Prudential Reasons to Limit the Appellees' Challenge to §1031(a), As It Is Applied to Probation Officers.

Initially it should be observed that there will result no prejudice to the plaintiffs if the Court declines to strike down California's entire statutory scheme if the probation officer

position they sought may be legitimately restricted to citizens. In view of the Court's earlier rulings in *Foley* and *Ambach*, and the manifest duties and responsibilities of probation officers as governmental employees, it appears that such a restriction is clearly constitutional.

The appellees have identified certain peace officer positions they suggest cannot be restricted to citizens, e.g., park rangers, fire wardens and guards and messengers in the Treasurer's office. The record, however, does not reflect the specific nature of the duties of these positions nor did the trial court make any finding of fact or even consider, taking their public responsibilities as a whole, whether they were part of the political community. It is apparent, however, that the holders of these positions have been entrusted with the power of the state to make arrests on behalf of its citizens. Thus, the circumstances are quite unlike that in *Sugarman* where the statute embraced all conceivable classifications that happened to be designated as civil servants and was not limited to a specific generic class such as teachers and peace officers. Factually, the case at bar is far more akin to *Foley* and *Ambach* than to *Sugarman*.

Because all incumbents of the enumerated positions possess peace officer status, including the power of arrest, we believe that under *Foley* they can be restricted to citizens because they exercise a fundamental attribute of state sovereignty. It cannot be said that these California peace officers have little or no relationship with legitimate state interests when they have been granted the authority to make arrests on probable cause, seize property, carry weapons, and represent the police power of government. It would thus be improper to strike down under the theory of being constitutionally overbroad the entire statutory scheme based upon an unproved and untried assertion that the statute possibly embraces some few job categories that cannot be restricted to citizens.

Even if there are such inappropriate classifications encompassed by the statute there are very few and should be determined only after trial on the merits as a result of a challenge by an interested party with standing. The Court in *Foley v. Connelie*, 98 S.Ct. at 1071 admonished that the Court must examine on a case by case basis each governmental position at issue. With the exception of probation officers, the lower court did not do so in this case.

The appellees' contention regarding multiple litigation to test the validity of the citizenship requirement for each category of peace officer is without merit because the same situation would exist if a citizenship qualification was included in each of the statutory subsections defining the public occupations accorded peace officer status. The fact that California statutory scheme does it by reference to one separate statute does not make it constitutionally defective.

California has entrusted its peace officers with fundamental attributes of state sovereignty. The state, in exercising its broad powers to define its political community, has specified that they shall be citizens if they are to exercise that public trust and responsibility. This Court has shown a reluctance to strike down state laws particularly when legitimate state concerns are affected and a limiting construction can be made. The *Sugarman* case should be restricted to its particular facts. The Plaintiffs in that case were clearly not in positions that could reasonably be construed as forming part of the political community (clerk typist, staff technician, and an administrative assistant). Applying the overbreadth doctrine to citizenship requirements should be limited to circumstances far more embracing in scope and defective in application than that present herein.

III.

THE CASE SHOULD NOT BE REMANDED, THE RECORD BEING CLEARLY ADEQUATE FOR CONSTITUTIONAL ANALYSIS.

The Amicus Curiae, National Center for Immigrants' Rights, suggest that the record on the duties of probation officers is inadequate to permit the Court to determine the

constitutional issue (Brief, p. 5). This contention is not well taken in view of the review two times by the trial court based on stipulated facts and an extensive statutory background defining the duties of the position.

This Court and others are more familiar with the duties, function and role of probation officers, than any other form of occupation with the exception of judicial officers and attorneys. The California statutory framework establishing and defining the duties of probation officers is quite extensive and is abundantly reflected in the record. The Court, of course, can take judicial notice of the duties of probation officers imposed by statute or required by the courts.

It is clear that there is no benefit to be gained by further delay in remanding the case to flesh out the record when the duties of the job in question could not be more clear or extensively documented. It is noteworthy that the appellees themselves have not requested a remand or assert that the record is insufficient to address the constitutional question. Moreover, they did not appeal from the trial court's denial of further discovery nor intimate it was prejudicial.

The appellees or their amici do not take the position that the duties of a probation officer in California vary in any significant degree from those performed by probation officers in other states or in the federal system. The amicus union, (SEIU, Local 535) representing *inter alia*, probation officers, has noted that "parole officers" duties are essentially the same throughout the state and the federal system" (Brief, p. 4). No one disputes this.

The trial court, fully cognizant of the extensive statutory duties performed by probation officers, was of the opinion, even in the face of this Court's decision in *Foley* and *Ambach*, that the public occupation did not justify a citizenship restriction. This, of course, the appellants dispute but the issue herein has never been over what the probation officer does, but whether in doing it, is the officer acting as part of the political community within the context of the *Sug-*

arman exception. The appellees themselves do not challenge the nature of a probation officer's functions or suggest how an augmented factual record is essential to the resolution of the constitutional issues. Rather, the thrust of their argument is that assuming the probation officers do what the statutes and the courts require them to do, their role, nevertheless, is so relatively unimportant in the relationship between the government and the citizens that probation officers are not within the "political community" that properly may be restricted to citizens. The present record is more than adequate for resolution of the Constitutional issues.[6] Appeal has been granted twice by this Court and there is absolutely no justification for further delaying the ultimate resolution of this matter.

Respectfully submitted,

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[6]The *Foley* case, of course, was submitted to the District Court based on a record of the pleadings. There appeared to be stipulation of facts in that case. See *Foley v. Connelie*, (1976) 419 F.Supp. 889, N. 1 at 891.